ARIZONA BOARD OF FINGERPRINTING

Mail Code 185 • Post Office Box 6129 • Phoenix, Arizona 85005-6129
Telephone (602) 265-0135 • Fax (602) 265-6240

Final Minutes for Public Meeting

Held March 7, 2008, at 8:30 a.m.
3839 North 3rd Street, Suite 107, Phoenix, Arizona

Board Members
Charles Easaw, Department of Education, Chair
Kim Pipersburgh, Department of Health Services, Vice Chair
Rand Rosenbaum, Administrative Office of the Courts
Mike LeHew, Department of Economic Security
Arthur W. Baker, Department of Juvenile Corrections

Executive Director
Dennis Seavers

CALL TO ORDER AND ROLL CALL

Mr. Easaw called the meeting to order at 8:48 a.m. The following Board members were present: Charles Easaw, Kim Pipersburgh, Rand Rosenbaum, and Mike LeHew. The following Board member was absent: Arthur W. Baker.

Also in attendance was Dennis Seavers, Executive Director.

CALL TO THE PUBLIC

Mr. Easaw made a call to the public. No members of the public wished to speak at this portion of the meeting.

MINUTES

Mr. LeHew made a motion to approve the draft minutes from the February 22, 2008 meeting. Mr. Rosenbaum seconded the motion, which passed, 4–0.

LEGISLATION

Mr. Seavers referred the Board members to his March 5, 2008 memo (Attachment 1) about House Bill ("HB") 2727. He reported that he met on March 6 with the bill's sponsor, legislative staff, and representatives from the Departments of Economic Security (DES) and Public Safety; the Board of Education; the Attorney General's Office; and the Arizona Education Association. Everyone met to discuss concerns about the bill, especially concerns from the teaching community. Mr. Seavers said that the two-tiered card system was proposed; DES said that it would present the proposal to its senior management, but Mr. Seavers said that he doubted DES would accept the proposal. Mr. Seavers said that he believed the proposal for two-tiered card system would be adopted, even if DES opposed it.

Mr. Seavers clarified that his recommendation in the March 5 memo was for a position that the Board should take on the bill. He said that individual agencies represented on the Board could take their own positions on the bill, independently of the Board.

Mr. Rosenbaum expressed concern about the Board's ability to make judgments about offense designations (i.e., felony or misdemeanor). Mr. Seavers said that he explained to DES that the Board would not be in a position to make these designation determinations. Ms. Pipersburgh asked how many people are affected by the relevant provisions of the Adam Walsh Act. Mr. Seavers said that DPS had estimated that about 8% of fingerprint-clearance-card applicants had applied under the programs for foster-care and adoptive parents, which were the only two programs that had to meet the Adam Walsh requirements. He said that DES did not want to drop those programs out of the fingerprint-clearance-card system because DES would not have file stops for foster-care or adoptive parents.

Mr. LeHew made a motion to take a position on HB 2727, and Ms. Pipersburgh seconded. The motion passed 4–0. Mr. LeHew made a motion to take the position described as option 5 in Mr. Seavers's memo. Under this option, the Board would support an amendment to establish a two-tiered card system. Ms. Pipersburgh seconded the motion, which passed, 4–0.

ADJOURNMENT

Mr. LeHew made a motion to adjourn the meeting, and Ms. Pipersburgh seconded. The motion passed, 4–0. Mr. Easaw adjourned the meeting at 9:32 a.m.

Minutes approved on May 16, 2008

_____

Dennis Seavers, Executive Director

Arizona Board of Fingerprinting

Memo

TO: Board members

FROM: Dennis Seavers, Executive Director

C:

Date: March 5, 2008

SUBJECT: House Bill 2727

At its March 7, 2008 meeting, the Board will discuss House Bill ("HB") 2727. This memo discusses recent developments with HB 2727, which is described in detail in the Board's February 8, 2008 minutes, with an update in the February 22, 2008 minutes. Since the March 7 agenda includes a discussion on whether the Board should take a position on the bill—and, if so, what position—I have also identified options for the Board to consider. I have recommended that the Board not oppose HB 2727 but support an amendment to establish a two-tiered card system. Board members should note that DES has rejected the option for a two-tiered card system, although DES remains open to discussions that the bill's sponsor called for.

BACKGROUND AND RECENT DEVELOPMENTS

HB 2727 represents an effort by DES to comply with certain provisions of the Adam Walsh Act (the "Act"). In particular, the bill would make significant changes to the fingerprint-clearance-card system by making certain offenses nonappealable and by requiring DPS and the Board to make application determinations based on the designation of an offense (i.e., whether the offense is a felony or misdemeanor). Although the Act applies only to certain programs regulated by DES (adoption and foster-parent programs), HB 2727, in its current form, would apply to all agencies.

As described in the February 22, 2008 minutes, Charles Easaw and I met with representatives from DPS and DES to discuss the bill. At that meeting, we discussed three options that DES has to comply with the Act.

- DES could drop the foster-parent and adoption programs out of the fingerprint-clearance-card system. DES has rejected this option because it would not have the file-stop program that is the basis for suspending fingerprint clearance cards. DES also rejected legislation that would allow DES periodically to submit new prints to receive updated rap sheets.

- DES could impose the requirements of the Act on all agencies in the fingerprint-clearance-card system. DES is currently pursuing this option.

- A two-tiered card system could be established, with a higher tier meeting the Act's requirements and a lower tier roughly corresponding to the current fingerprint-clearance-card system. DES said at the meeting with representatives from the Board and DPS that it would consider this option. DES has since rejected the option, although it may still have discussions with Rep. Hershberger, the bill's sponsor.

At previous meetings, the Board had not decided not to take a position at that time on HB 2727 because DES was considering revisions to the bill; the Board and other agencies did not want to adversely affect the bill, some version of which is necessary for DES to comply with the Act, the relevant portion of which is tied to well over $100 million in federal funds. Since DES has decided to continue pursuing the bill in its introduced form (apart from some technical changes), the Board may want to revisit the question of whether to take a position on the bill.

As discussed below, this memo proposes that the Board take the following positions on HB 2727 (see option 5 below).

- The Board should not oppose the bill.

- The Board should support an amendment to establish a two-tiered card system.

OPTIONS

Option 1: Oppose

The Board could oppose HB 2727 in its current form, at least until the bill is changed.

Since DES risks losing significant amounts of federal funding if some version of this bill does not pass, the Board should not oppose HB 2727.

Option 2: Support

The Board could support HB 2727. However, the Board's purpose in many applications would change substantially, and the Board does not have the resources to achieve this new purpose. Specifically, the Board would be required to make determinations on the designation of offenses, often instead of weighing an applicant's rehabilitation. (For some applications, the Board would have to make determinations about rehabilitation for certain offenses and determinations about the designation for other offenses.) The Board would be required to make this determination even though the designation frequently is unavailable, either because the offense is currently undesignated or because the criminal-history records do not indicate the classification. A number of negative consequences would arise from this requirement.

- Some applicants would be required to apply to the Board, possibly for the sole purpose of having the Board make a determination that the Board cannot make.

  For instance, suppose that an applicant applies to the Board in 2009 and has a single offense on his record: a 2006 DUI committed out of state. DPS must spend 30 business

days determining whether the DUI is a felony or misdemeanor, but the designation information is not available. Therefore, DPS would deny the fingerprint-clearance-card application, but the applicant would be able to apply for a good cause exception from the Board.[1] If the DUI was a felony, the applicant would not be eligible for a good cause exception; if the DUI was a misdemeanor, the Board would be required to grant a good cause exception because misdemeanor DUI would not be a precluding offense. Therefore, the Board, which normally determines whether an applicant is rehabilitated and not a recidivist, would only be determining the designation of the offense, regardless of evidence of rehabilitation or recidivism. But the Board is in an inferior position than DPS to determine the designation of an offense, given the Board's current staffing resources. Moreover, if DPS cannot determine the designation within 30 business days, the designation is probably unavailable from court or law-enforcement-agency records. The Board then would have to make its determination on the designation of the offense based solely on an applicant's testimony. Since applicants currently have trouble, for various reasons, providing accurate testimony simply on whether they were convicted of charges, it is improbable that applicants will be a reliable source of information about the designation of an offense.

In sum, the applicant would be required to apply to the Board, just for the Board to make a determination that the Board has no reliable way of making.

- In other cases, the Board would be required to make an initial determination about the designation of an offense before concluding whether an applicant is rehabilitated and not a recidivist.

  For instance, suppose that an applicant has a 1972 child-neglect offense on his record. Under HB 2727, the applicant would be eligible to get a good cause exception if the offense was a misdemeanor, but the applicant would not be eligible to get a good cause exception if the offense was a felony.[2] Thus, the Board first must determine the designation of the offense. In this case, the Board would face the same obstacles to determining the designation of the offense as in the example above. However, the Board would be in an even worse position than the example above (the 2006 DUI) to determine the designation of the offense because records so old would less likely be available.

Given the operational problems that HB 2727 would impose on the Board, the Board should not support (but neither should it oppose) HB 2727.

[1] Under A.R.S. § 41–1758.03(L), an applicant may request a good cause exception if DPS cannot determine the disposition of the offense, even if the offense is listed under A.R.S. § 41–1758.03(B), the list of nonappealable offenses.

[2] Under A.R.S. § 41–619.55(E), the Board may grant a good cause exception if the applicant shows to the Board or its hearing officer's satisfaction that "the person is not awaiting trial or has not been convicted of committing any of the offenses listed in section 41–1758.03(B) . . ." Under the changes in HB 2727, felony child neglect would be an offense listed in A.R.S. § 41–1758.03(B)—the list of nonappealable offenses—while misdemeanor child neglect would be an offense listed in A.R.S. § 41–1758.03(C)—the list of appealable offenses.

Option 3: Remain neutral

The Board could remain neutral on HB 2727. One could argue that the Board should have a limited role in advocating for or opposing the bill because the Board, along with DPS, administers a program on behalf of other state agencies; the burden should be on those other agencies to support or oppose the public policy reflected in the bill. Although the Board should give consideration to this argument, the Board also should note that the Board has in the past advocated for public policy that does not directly affect the Board. For instance, in the 2007 legislative session, the Board was the lead agency in securing sponsorship for and lobbying for Senate Bill ("SB") 1045, which added several new offenses to this list of precluding crimes. In addition, unlike SB 1045, HB 2727 directly affects the Board (see the discussion under option 2 above), so the Board's operational interest in the outcome of HB 2727 is greater than it was for SB 1045.

The Board should not continue to remain neutral. The Board has primarily remained neutral because DES was considering changes to the bill. Since DES has declined to accept those changes, apart from technical alterations, this reason for remaining neutral no longer applies. Furthermore, the Board is directly affected by the bill, so it is appropriate for the Board to weigh in on the policy represented in the bill.

Option 4: Support an amendment to remove the foster-parent and adoption programs from the fingerprint-clearance-card system.

The Board could support an amendment to remove the foster-parent and adoption programs from the fingerprint-clearance-card system. Instead of being in the card system, DES would receive the rap sheets directly from DPS and decide internally whether an applicant was eligible under the Act to become a foster or adoptive parent.

This option would have the least impact on the Board, and thus it represents the best alternative from the perspective of Board operations. In particular, the Board would not have to make determinations about the designation of offenses. However, under this alternative, DES would not have access to the file-stop process, in which agencies are notified once DPS learns of an applicant being arrested for a precluding offense. DES has also rejected a proposal for DES to be able to request updated rap sheets at regular intervals.

Although this option represents the best alternative from the perspective of Board operations, the Board should not support this option. In the interest of working with DES, the Board should instead support the compromise represented by option 5 below.

Option 5: Support an amendment to establish a two-tiered card system.

The Board could support an amendment that would restore a two-tiered card system, perhaps similar to the class-one and class-two card system that existed from 1999 to 2003.[3] Class-one cards (the higher-tier cards) would meet the Act's requirements; class-two cards (the lower-tier

[3] The names—class one and class two—for the two card types are not important. Those names are used here only for the purpose of discussion.

cards) would resemble the current fingerprint clearance card. Apart from the two programs that must comply with the Act (the foster-parent and adoption programs), each agency in the card system could then select between the card types for its own regulatory scheme. For instance, the State Board of Education could choose class two cards for teacher certification, while the Department of Economic Security could choose class one cards for its information-technology personnel. Naturally, if multiple agencies regulate a single program (such as at-risk youth programs, which are regulated by the Administrative Office of the Courts and the Departments of Economic Security, Health Services, and Juvenile Corrections), those agencies should try to reach consensus on the appropriate card level.

The Board should support this option. Although this option does not avoid the problem of requiring the Board to make determinations about offense designations, the option at least limits the number of instances in which the Board would have to make those determinations. The two features of a fingerprint-clearance program that DES wants—a file-stop program and compliance with the Act—would be achieved, so DES should not have objections to a two-tiered card system.[4] Thus, this option is a reasonable compromise between the interests of the Board and other agencies in the card system, particularly those that would oppose the current form of HB 2727, and the interests of DES.

[4] On this point, DES's rejection of the two-tiered card system is puzzling. DES has not identified specific, credible reasons for preferring a single-tiered card system over a two-tiered card system, even though I have requested those reasons.